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# The Pay or Play Penalty Under the Affordable Care Act: Emerging Issues

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# THE PAY OR PLAY PENALTY UNDER THE AFFORDABLE CARE ACT: EMERGING ISSUES

KATHRYN L. MOORE†

## I. INTRODUCTION

The Affordable Care Act<sup>1</sup> does not require that employers provide employees with health care coverage. It does, however, impose an excise tax on large employers that fail to offer their employees affordable employer-sponsored health care coverage.<sup>2</sup> The excise tax, commonly referred to as a “pay-or-play penalty,” was scheduled to go into effect beginning in 2014. The United States Treasury Department (“Treasury”), however, has delayed enforcement of the penalty until 2015 for employers with 100 or more full-time employees, and until 2016 for employers with 50 to 99 employees.<sup>3</sup>

Implementation of the pay-or-play penalty has given rise to a host of questions and a great deal of uncertainty and consternation among employers, particularly among small to medium-sized employers. Issues range from very narrow technical questions, such as how to calculate the hours of service of adjunct faculty and airline pilots,<sup>4</sup> to broad planning questions, such as how an employer might restructure its workforce to avoid the penalty. This Article focuses on emerging issues in two specific areas, (1) spousal and dependent coverage and (2) “workforce realignments,” that is, employers’ efforts to reduce the size of their workforce or employees’ hours to avoid the pay-or-play penalty.

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1. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).

2. I.R.C. § 4980H (2011).

3. In July 2013, the Treasury Department announced that it would delay enforcement of the penalty until 2015. I.R.S. Notice 2013-45 (July 9, 2013), *available at* <http://www.irs.gov/pub/irs-drop/n-13-45.pdf>. In issuing the final I.R.C. § 4980H regulations in February 2014, the Treasury Department extended the delay until 2016 for employers with 50 to 99 workers and provided a transitional rule for 2015 for employers with 100 or more employees. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574-76 (Feb. 12, 2014) (to be codified at 26 C.F.R. pt. 1, 54, 301).

4. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. at 8551-52 (discussing calculation of hours of service of adjunct faculty and airline pilots).

This Article begins by providing an overview of the pay-or-play penalty. It then discusses two issues with respect to spousal and dependent coverage: (1) determining the affordability of dependent coverage, and (2) employers' recent reductions in spousal coverage. It then analyzes whether employers' efforts to realign their workforces in order to avoid the pay-or-play penalty are likely to violate Section 510 of the Employee Retirement Income Security Act ("ERISA")<sup>5</sup> and/or the Affordable Care Act's ("ACA") whistleblower provision. Included in this discussion is an analysis of whether an employer would violate the ACA whistleblower provision if it threatens to terminate the employee if the employee purchases subsidized health insurance on a health insurance exchange ("exchange").<sup>6</sup>

## II. OVERVIEW OF THE PAY OR PLAY PENALTY

Section 4980H of the Internal Revenue Code imposes an excise tax on "applicable large employers" that fail to offer employees the opportunity to enroll in "minimum essential coverage"<sup>7</sup> under an eligible employer-sponsored health care plan.<sup>8</sup> The pay-or-play penalty only applies to "applicable large employers." For purposes of the penalty, an "applicable large employer" is generally defined as an employer<sup>9</sup> that employed an average of at least fifty full-time employees during the preceding calendar year.<sup>10</sup> Full-time employees are generally defined as employees who perform, on average, at least thirty hours of service per week.<sup>11</sup>

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5. 29 U.S.C. § 1001 et seq. (2010).

6. Health insurance exchanges are structured marketplaces for the sale and purchase of health insurance. BERNADETTE FERNANDEZ & ANNIE L. MACH, HEALTH INSURANCE EXCHANGES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA), CONGRESSIONAL RESEARCH SERVICE, CRS R42663 7, 8 (Jan. 2013), available at <http://fas.org/sgp/crs/misc/R42663.pdf> ("The exchange concept was included in [the Affordable Care Act] as a means to increase access to health insurance."). They are like a "shopping mall where individuals evaluate and select appropriate health care plans for themselves and their families." Erin M. Sweeney, *What Employers Must Do (and Not Do) in 2013 to Get Ready for Health Care Reform*, CA LABOR & EMPLOYMENT BULLETIN 200, 200 (June 2013), [http://www.dicksteinshapiro.com/sites/default/files/What\\_Employers\\_Must\\_Do\\_And\\_Not\\_Do\\_In\\_2013\\_To\\_Get\\_Ready\\_For\\_Health\\_Care\\_Reform\\_June\\_2013.pdf](http://www.dicksteinshapiro.com/sites/default/files/What_Employers_Must_Do_And_Not_Do_In_2013_To_Get_Ready_For_Health_Care_Reform_June_2013.pdf).

7. Section 5000A(f) of the Internal Revenue Code defines minimum essential coverage. It provides that minimum essential coverage includes coverage under an eligible employer-sponsored plan. I.R.C. § 5000A(f)(1)(B) (2012).

8. I.R.C. § 4980H (2011).

9. In identifying the employer, the aggregation rules applicable to qualified plans apply. I.R.C. § 4980H(c)(2)(C)(i). For an overview of the aggregation rules, see LAWRENCE A. FROLIK & KATHRYN L. MOORE, *LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS*, 524-26 (3d ed. 2012).

10. I.R.C. § 4980H(c)(2)(A).

11. I.R.C. § 4980H(c)(4)(A). Solely for purposes of determining whether an employer qualifies as a "large" employer, full-time equivalents must be taken into account.

An employer may become subject to the pay-or-play penalty in one of two ways. First, under section 4980H(a) of the Internal Revenue Code, an employer will be subject to a “no-offer penalty” if (1) the employer does not offer its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored group health plan for a month, and (2) at least one full-time employee is certified to claim a premium assistance tax credit. Second, under section 4980H(b), an employer will be subject to an “unaffordable coverage penalty” if (1) the employer offers its full-time employees<sup>12</sup> and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored group health plan for a month, and (2) at least one full-time employee is certified to claim a premium assistance tax credit.

Generally, an employee will be eligible for a premium assistance tax credit<sup>13</sup> for health coverage purchased through a health insurance exchange if (1) the employee’s household income is between 100% and 400% of the federal poverty level, and (2) either (a) the employee is not eligible to participate in an employer-sponsored group health plan or (b) the employee is eligible to participate in such a plan, but (i) coverage under the employer’s plan is “unaffordable,” that is, the premium required to be paid exceeds 9.5% of the employee’s household income,<sup>14</sup> or (ii) the plan does not provide “minimum value,” that is, the plan’s share of the total allowed cost of benefits is less than 60%.<sup>15</sup>

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I.R.C. § 4980H(c)(2)(E). Full-time equivalents are calculated by adding the total hours worked in a month by employees, other than full-time employees, and dividing by 120. *Id.* For example, if ten employees, who were not full-time employees work a total of 240 hours per month for the employer, the employer will be treated as having two full-time equivalents.

12. The regulations treat an employer as having offered coverage to its full-time employees so long as it offers coverage to at least 95% of its employees. Treas. Reg. § 54.4980H-4(a) (2014). Under the transitional relief, employers with 100 or more employees will be treated as having offered coverage to its full-time employees so long as it offers coverage to at least 70% of its employees. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8575, XV.D.6-7 (Feb. 12, 2014) (to be codified at 26 C.F.R. pt. 1, 54, 301).

13. In addition to the premium assistance tax credit, a taxpayer purchasing insurance from an exchange may be eligible for cost-sharing subsidies. The cost-sharing subsidy reduces the taxpayer’s out-of-pocket costs for deductibles, coinsurance, copayments, and other amounts the taxpayers would otherwise be required to pay. Like the premium tax credit, the eligibility for value of cost-sharing subsidy depends on the taxpayer’s household income. 42 U.S.C. § 18071 (2010).

14. I.R.C. § 36B(c)(2)(C)(i) (2011).

15. I.R.C. § 36B(c)(2)(C)(ii). “[T]he purpose of the minimum value rule is to ensure that employer-provided insurance must have some real content in order to protect the employer-mandate penalties of § 4980H and in order to disqualify employees from receiving the premium tax credits.” David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 688 n.100 (Summer 2012).

The no-offer penalty under section 4980H(a) is \$2,000 per year (or 1/12 of \$2,000 per month)<sup>16</sup> per full-time employee employed by the employer,<sup>17</sup> although 30 full-time employees may be excluded in calculating the penalty.<sup>18</sup> The no-offer penalty is indexed to the rate of premium growth after 2014.<sup>19</sup> The unaffordable coverage penalty under section 4980H(b) is \$3,000 per year (or 1/12 of \$3,000 per month) for each full-time employee receiving a premium tax credit,<sup>20</sup> up to the maximum penalty that could be imposed under section 4980H(a)<sup>21</sup> (or \$2,000 per year (or 1/12 of \$2,000 per month) times the employer's entire full-time workforce minus 30 workers).<sup>22</sup> Like the no-offer penalty, the unaffordable coverage penalty is indexed to the rate of premium growth after 2014.<sup>23</sup>

To illustrate, suppose that an employer has 100 full-time employees and does not offer its full-time employees and their dependents coverage under an eligible employer-sponsored group health plan. If two employees are certified to claim a premium assistance tax credit, that is, they purchase subsidized health insurance on an exchange, the employer will be subject to a penalty of \$140,000 that year.<sup>24</sup> In contrast, if the employer offers coverage, but the coverage is unaffordable for two employees and they purchase subsidized insurance on an exchange, the penalty would only be \$6,000 that year.<sup>25</sup>

The following chart provides an overview of the section 4980H pay-or-play penalty.

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16. I.R.C. § 4980H(c)(1).

17. I.R.C. § 4980H(a).

18. I.R.C. § 4980H(c)(2)(D)(i)(I).

19. I.R.C. § 4980H(c)(5).

20. I.R.C. § 4980H(b)(1).

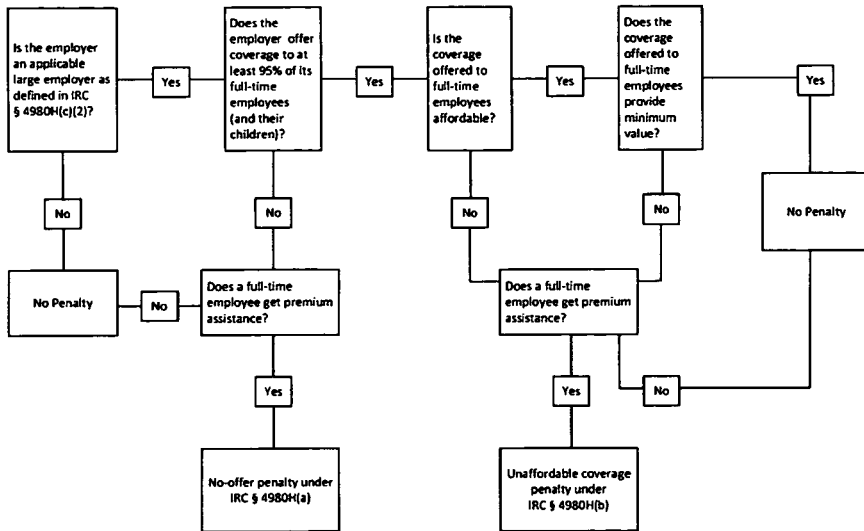
21. I.R.C. § 4980H(b)(2).

22. I.R.C. § 4980H(c)(2)(D)(i)(II).

23. I.R.C. § 4980H(c)(5).

24.  $\$2,000 \times (100-30) = \$2,000 \times 70 = \$140,000$ .

25.  $\$3,000 \times 2 = \$6,000$ .



### III. SPOUSAL AND DEPENDENT COVERAGE

As noted above, section 4980H of the Internal Revenue Code provides that a large employer may be subject to an excise tax if it fails to offer affordable coverage to its employees and their dependents. Section 4980H, however, does not define the term "dependent." The Treasury regulations fill this gap by defining dependent as an employee's child (as defined in section 152(f)(1) of the Internal Revenue Code)<sup>26</sup> under the age of twenty-six and explicitly excluding spouses from the definition of dependent.<sup>27</sup> Thus, under the regulations, an employer will not be subject to a pay-or-play penalty for failure to offer coverage to its employees' spouses.

#### A. "AFFORDABILITY" OF DEPENDENT COVERAGE

At first blush, the pay-or-play regulations would seem to favor dependents over spouses by subjecting employers to a penalty for failure to offer dependents affordable coverage but not for failure to offer spouses affordable coverage. In some instances, however, the spouse may actually be better off than the dependents if the employer does not offer spousal coverage because the spouse, but not the dependents, may be eligible for subsidized coverage through an exchange if the

26. I.R.C. § 152(f)(1) (2008) (defining child as a son, daughter, stepchild, adopted child or child placed for foster care).

27. Treas. Reg. § 54.4980H-1(a)(12) (2014).

spouse does not have access to “affordable” employer-sponsored coverage.<sup>28</sup>

Section 36B of the Internal Revenue Code provides a premium assistance tax credit for certain “applicable taxpayers” who purchase health insurance through an exchange. Applicable taxpayers are defined as taxpayers with annual household income between 100% and 400% of the federal poverty line based on the taxpayer’s family size.<sup>29</sup> In order to be eligible for a premium tax credit, “applicable taxpayers” must not be eligible for government-sponsored health care coverage, such as Medicare or Medicaid, or affordable employer-sponsored health insurance.<sup>30</sup>

Section 36B provides that employer-sponsored health insurance is considered to be affordable if the employee’s share of the premium does not exceed 9.5% of the employee’s household income.<sup>31</sup> The statute, however, is ambiguous as to whether the employee’s share of the premium refers to the cost of employee-only coverage or family coverage.<sup>32</sup>

Family coverage is typically much more expensive than individual coverage, and employers typically require employees to pay more for family coverage than for individual coverage. For example, in 2013, the average annual worker contribution to premiums for single cover-

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28. Depending on the employee’s share of the premium, even some low-income employees without dependents might be better off with subsidized coverage through an exchange than with employer-provided coverage.

Under section 36B of the Internal Revenue Code, a premium tax credit is provided on a sliding scale to taxpayers with household income between 100% and 400% of the federal poverty line. Taxpayers with household income that is less than 133% of the federal poverty line are expected to contribute no more than 2% of household income toward health insurance while taxpayers with household income between 300% and 400% of the federal poverty line are expected to contribute no more than 9.5% of household income toward health insurance. The amount taxpayers with household income between 133% and 300% of the federal poverty line are expected to contribute gradually increases from 2% to 9.5% of household income. Generally, the breakeven point, that is, the point at which an individual would be better off with employer-provided health insurance than government-subsidized health insurance, is household income of 350% to 375% of the federal poverty line for individuals and 400% of the federal poverty line for a household of four. See Gamage, *supra* note 14 at 687-91.

29. I.R.C. § 36B(c)(1)(A) (2011).

30. I.R.C. § 36B(c)(2)(B)-(C).

31. I.R.C. § 36B(c)(2)(C).

32. For a discussion of why the statutory language is ambiguous, see RICHARD V. BURKHAUSER, SEAN LYONS, & KOSALI I. SIMON, THE IMPORTANCE OF THE MEANING AND MEASUREMENT OF “AFFORDABLE” IN THE AFFORDABLE CARE ACT, Working Paper 17279, 6-8 (National Bureau of Economic Research, 2011), available at <http://www.nber.org/papers/w17279.pdf>.

age was \$999 while the average annual worker contribution to premiums for family coverage was \$4,565.<sup>33</sup>

After the Affordable Care Act was enacted, there was considerable debate as to whether the cost of employee-only or family coverage should be taken into account in determining whether employer-sponsored health insurance is affordable for dependents.<sup>34</sup>

In Notice 2011-73, the IRS clarified that for purposes of the section 4980H pay-or-play penalty, affordability is to be based on the employee's share of the premium for individual, or self-only, coverage and not family coverage.<sup>35</sup> When the Treasury Department issued the final section 36B premium tax regulations in May 2012,<sup>36</sup> it determined that affordability for purposes of employee's eligibility is based on the employee's share of the premium for employee-only coverage.<sup>37</sup> The Treasury Department, however, reserved a rule for determining affordability of employer-sponsored coverage for dependents.<sup>38</sup> On February 1, 2013, the Department of Treasury amended the section 36B regulations to provide that the cost of employee-only coverage is to be taken into account in determining whether dependent coverage is eligible for a premium tax credit.<sup>39</sup> On that same day, the Treasury Department issued proposed section 5000A regulations<sup>40</sup> providing that for purposes of the individual mandate, affordability is to be based on the employee's share of the cost of family coverage.<sup>41</sup>

Thus, under the current Treasury guidance, a dependent is not eligible for subsidized coverage under an exchange if the employee's

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33. THE KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS: 2013 ANNUAL SURVEY, 74-75, Exhibits 6.3 & 6.4 (2013).

34. See, e.g. BURKHAUSER ET. AL., *supra* note 31; Sarah Kliff, *The Affordable Care Act's 'affordability' paradox*, WASHINGTON POST (Dec. 14, 2011, 12:52 PM), [http://www.washingtonpost.com/blogs/wonkblog/post/the-affordable-care-acts-affordability-paradox/2011/12/14/gIQAAGhBuO\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/the-affordable-care-acts-affordability-paradox/2011/12/14/gIQAAGhBuO_blog.html).

35. The final Treasury Regulations do not change that rule. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8546 (Feb. 12, 2014) (to be codified at 26 C.F.R. pt. 1, 54, 301) (stating that affordability is based on cost of self-only coverage).

36. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377-01 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1, 602), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf>.

37. *Id.* at 30388 (adding Treas. Reg. § 1.36B-2(c)(3)(v)(A)(1)).

38. *Id.* at 30389 (reserving Treas. Reg. § 1.36B-2(c)(3)(v)(A)(2)).

39. Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264-01, 7264-65 (Feb. 1, 2013) (to be codified at 26 C.F.R. pt. 1) (adding Treas. Reg. § 1.36B-2(c)(3)(v)(A)(2)), available at [www.gpo.gov/fdsys/pkg/FR-2013-02-01/pdf/2013-02136.pdf](http://www.gpo.gov/fdsys/pkg/FR-2013-02-01/pdf/2013-02136.pdf).

40. Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 7314-01 (Feb. 1, 2013) (to be codified at 26 C.F.R. pt. 1).

41. *Id.* at 7326 (proposing Treas. Reg. § 1.5000A-3(e)(3)(ii)(B)). This regulation was made final on August 30, 2013. Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 53646, 53659 (Aug. 30, 2013) (to be codified at 26 C.F.R. pt. 1, 602) (finalizing Treas. Reg. § 1.5000A-3(e)(3)(ii)(B)).



share of self-only coverage is affordable, but no excise tax under the section 5000A individual mandate will be imposed if the dependent does not have health insurance and the employee's share of the premiums for family coverage exceeds 9.5% of household income.

According to one estimate, defining affordability for dependents in terms of the cost of employee-only coverage rather than family coverage could cause more than 6,000,000 workers who would otherwise have been eligible for subsidized health insurance through an exchange to find themselves in a "no-man's land" with access to affordable single health care coverage but no access to affordable family coverage.<sup>42</sup> According to another study, this definition of affordability may adversely impact 144,000 Californians who would otherwise have been eligible for subsidized coverage through an exchange if affordable dependent coverage had been based on the employee's share of the premiums for family coverage.<sup>43</sup>

If an employer does not offer spousal coverage, then the spouse may be eligible for subsidized insurance through an exchange if the family's household income is less than 400% of the federal poverty line – even if the rest of the spouse's family is eligible for affordable employer-sponsored coverage.<sup>44</sup> Whether a spouse would be better off with or without employer-provided health insurance depends principally on the employee's share of the premium for employer-sponsored health insurance and the family's household income relative to the federal poverty line.<sup>45</sup> Generally, spouses are better off with subsidized health insurance through an exchange, rather than employer-sponsored coverage, if their household income is no more than 350% to 375% of the federal poverty line.<sup>46</sup>

## B. REDUCTIONS IN SPOUSAL COVERAGE

Since the enactment of the Affordable Care Act, employers have begun to cut back on some spousal coverage. Specifically, employers

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42. Burkhauser et al., *supra* note 31, at 26-27, 37.

43. KEN JACOBS ET AL., PROPOSED REGULATIONS COULD LIMIT ACCESS TO AFFORDABLE HEALTH COVERAGE FOR WORKERS' CHILDREN AND FAMILY MEMBERS (University of California, Berkeley Center for Labor Research and Education and University of California, Los Angeles Center for Health Policy Research 2011), available at [http://laborcenter.berkeley.edu/healthcare/Proposed\\_Regulations11.pdf](http://laborcenter.berkeley.edu/healthcare/Proposed_Regulations11.pdf).

44. See Treas. Reg. §§ 1.36B-2(a)(2), (c)(3) (2013) (providing that a taxpayer is allowed premium assistance for a month in which one or more members of the taxpayer family, including the taxpayer's spouse, is not eligible for "minimum essential coverage," including affordable employer-sponsored coverage).

45. For a detailed description of how the premium tax credit is computed, see Health Insurance Premium Tax Credit, 77 Fed. Reg., 30377, 30382-83 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1, 602), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf>.

46. See *supra* note 27.

have begun to reduce coverage for working spouses whose employers offer the spouses health insurance. Interestingly, few, if any, employers have changed coverage for spouses who do not have access to health insurance through their own employers.

Employers have reduced coverage for spouses with access to health insurance through their own employers in couple of different ways. Some employers have added a “surcharge” or increased the share of premiums workers must pay for spousal coverage for spouses who have access to health insurance through their own jobs.<sup>47</sup> Other employers have gone further and eliminated coverage for such spouses.<sup>48</sup>

Employers (and critics of the Affordable Care Act) often attribute these changes in spousal coverage for working spouses to the Affordable Care Act.<sup>49</sup> For example, in perhaps the most widely publicized case,<sup>50</sup> the United Parcel Service (“UPS”) explained that it had decided to eliminate spousal coverage for spouses with access to health insurance through their own employers in order to address costs imposed by the Affordable Care Act and “allow[] UPS to continue to provide its employees and their families with the coverage they need and value, at an affordable cost.”<sup>51</sup> Other employers have claimed that

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47. See TOWERS WATSON, *RESHAPING HEALTH CARE: BEST PERFORMERS LEADING THE WAY* 19, Fig. 22 (2013) (showing that in 2013, 20% of employers responding to survey use spousal surcharges when other coverage is available and 13% of employers plan to add such surcharges in 2014).

48. See, e.g., Jose Pagliery, *UPS Cuts Insurance to 15,000 Spouses, Blames Obamacare*, CNN MONEY (Aug. 22, 2013), <http://money.cnn.com/2013/08/21/news/companies/ups-obamacare/>; Julie Rovner, *Employer's Trim Health Costs by Cutting Coverage for Spouses*, NPR.ORG HEALTH BLOG “SHOTS” (Sept. 19, 2013, 3:20 AM ET), <http://www.npr.org/blogs/healthy/2013/09/10/223786934/employers-trim-health-costs-by-cutting-coverage-for-spouses>; Steven Greenhouse, *UPS to End Health Benefits for Spouses of Some Workers*, N.Y. TIMES at B1 (Aug. 22, 2013), <http://www.nytimes.com/2013/08/22/business/ups-to-end-health-benefits-for-spouses-of-some-workers.html>; Jen Wiecezner, *Why Your Boss is Dumping Your Wife*, WALL ST. J. MARKETWATCH (Aug. 22, 2013, 12:45 pm EDT), <http://www.marketwatch.com/story/why-your-boss-is-dumping-your-wife-2013-02-22>; Working Spouse Eligibility: Frequently Asked Questions 1 (July 15, 2013), available at <http://i.cdn.turner.com/money/2013/images/08/21/UPS-Spousal-Coverage.pdf> (stating that according to market data, 35% of companies planned in 2014 to exclude spousal coverage for working spouses with coverage through their own employer).

49. See, e.g., Chelsey Livingston, *Premier Health dropping health insurance for working spouses*, DAYTON DAILY NEWS, 2013 WLNR 26409710 (Oct. 18, 2003); Dana Milbank, *Democrats own health care; The law will be blamed for all bad things, even if it's not at fault*, WASHINGTONPOST.COM, 2013 WLNR 26551780 (Oct. 23, 2013).

50. See, e.g., Pagliery, *supra* note 47.

51. Working Spouse Eligibility: Frequently Asked Questions 2 (July 13, 2015), available at <http://i.cdn.turner.com/money/2013/images/08/21/UPS-Spousal-Coverage.pdf>.

they have made such changes in response to section 4980I,<sup>52</sup> the Affordable Care Act's so-called "Cadillac tax."<sup>53</sup>

These changes in spousal benefits are undoubtedly driven by cost considerations. Indeed, UPS claims that it will save \$60 million per year by eliminating spousal coverage for working spouses with access to employment-based health insurance through their own employers.<sup>54</sup>

It is unlikely, however, that such changes are driven solely, or even largely, by escalating costs caused by the Affordable Care Act.<sup>55</sup> High health care costs have long been a problem in this country.<sup>56</sup>

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52. Section 4980I(a) of the Internal Revenue Code imposes an excise tax on any excess benefit provided under applicable employer-sponsored coverage. Generally, a health plan qualifies as applicable employer-sponsored coverage if the value of coverage is excludable from the employee's income under section 106 of the Internal Revenue Code. I.R.C. § 4980I(d)(1)(A). An excess benefit arises if the annual cost of coverage exceeds \$10,200 (in the case of individual coverage) or \$27,500 (in the case of family coverage), multiplied by a health cost adjustment percentage. I.R.C. § 4980I(b). The health cost adjustment percentage increases the dollar limits to the extent that the 2018 per employee cost under the Blue Cross/Blue Shield standard option under the Federal Employees Health Benefits Plan exceeds the 2010 cost by more than 55%. I.R.C. § 4980I(b)(3)(C)(ii). After 2018, the dollar limits will be adjusted for inflation. I.R.C. § 4980I(b)(3)(C)(v).

53. See, e.g., Rich Kirchen, *Konecranes dropping spouse coverage, blames Obama-care's Cadillac tax*, BUSINESS JOURNAL (Nov. 5, 2013, 2:35 pm CST), <http://www.bizjournals.com/milwaukee/news/2013/11/05/konecranes-drops-spouse-coverage.html>; McGregor McCance, *University Employees Will See Significant Changes to Health Plan This Year*, UVA TODAY (Aug. 21, 2013), <http://news.virginia.edu/content/university-employees-will-see-significant-changes-health-plan-year>. For an overview of the "Cadillac tax," see Julie Piotrowski, *Excise Tax on Cadillac Plans*, HEALTH AFFAIRS: HEALTH POLICY BRIEFS (Sept. 12, 2013), [http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief\\_id=99](http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=99).

54. Jay Hancock, *UPS won't insure spouses of many employees*, USA TODAY (Aug. 20, 2013, 4:55 pm EDT), <http://www.usatoday.com/story/money/business/2013/08/20/ups-spouses-health-insurance/2651713/>. Interestingly, according to a recent Employee Benefit Research Institute (EBRI) study, costs may actually increase for some employers that exclude coverage for working spouses with access to their own coverage if they continue to cover nonworking spouses because nonworking spouses may spend more on health care services than working spouses. Paul Fronstin, *The Cost of Spousal Health Coverage*, 35 EBRI NOTES 2 (Jan. 2014).

55. Milbank, *supra* note 48.

56. In 2010, the United States spent \$2.6 trillion, or the equivalent of \$8,402 per person, on health care. THE KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST, HEALTH CARE COSTS: A PRIMER 4 (May 2012). This \$2.6 trillion represents 17.9% of the nation's gross domestic product (GDP), the highest of any developed nation. *Id.* at 4, 7. Moreover, health care spending has exceeded growth in the U.S. economy virtually every year for the last 30 years, and the cost of employer-provided health insurance has increased dramatically over the years. NATIONAL HEALTH INSTITUTE FOR HEALTH CARE MANAGEMENT, U.S. HEALTH CARE SPENDING: THE BIG PICTURE 3, Fig. 3 (May 2012); see KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS, *supra* note 32, at 72-73, Exhibits 6.3 & 6.4 (showing that average total premium for employer-provided health insurance for a single individual increased from \$2,196 in 1999 to \$5,884 in 2013, and the average total premium for family coverage increased from \$5,791 in 1999 to \$16,351 in 2013).

Over the years, employers have addressed rising health care costs in a variety of ways, including shifting costs to employees by increasing the share of premiums employees are required to pay<sup>57</sup> and imposing higher deductibles<sup>58</sup> and co-payments for doctor visits.<sup>59</sup> Moreover, the growth in health care costs has actually slowed since the enactment of the Affordable Care Act.<sup>60</sup>

It is also unlikely that the Cadillac tax is the true motivation behind employers' elimination of spousal coverage for working spouses with their own employment-based health insurance. The Cadillac tax is not scheduled to go into effect until 2018.<sup>61</sup> It seems unlikely that employers have eliminated spousal coverage solely, or even principally, due to a tax that is not scheduled to go into effect for four years.<sup>62</sup> Moreover, it is quite possible that the Cadillac tax, a politically unpopular tax, will be repealed before its effective date.<sup>63</sup>

This is not to suggest that employers need not and will not change their health care plans if the Cadillac tax goes into effect in 2018. According to some estimates, the Cadillac tax may affect as many as 60% of employers.<sup>64</sup> If the Cadillac tax goes into effect, many employers

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57. See KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS, *supra* note 32, at 70, Exhibit 6.1 (showing that over time employers have required employees to pay a larger percentage of health insurance premiums).

58. See *id.* at 103, Exhibit 7.2 (showing increase over time in number of employees in plans with deductibles).

59. See *id.* at 130-31, Exhibits 7.29, 7.30 (showing increase over time in co-payments for primary care and specialty doctor visits).

60. See TRENDS IN HEALTH CARE COST GROWTH AND THE ROLE OF THE AFFORDABLE CARE ACT, COUNCIL OF ECONOMIC ADVISERS (Nov. 2013) (asserting that the Affordable Care Act is contributing to slow down the rate of growth).

61. Bradley Herring & Lisa Korin Lentz, *How Can We Bend the Cost Curve: What can we expect from the "Cadillac" tax in 2018 and Beyond*, 48 INQUIRY 322, 322-23 (Winter 2011-2012) ("The amendment to reconcile the Senate and House versions of the legislation postponed the implementation of the Senate's excise tax proposal from 2013 to 2018").

62. Kirchen, *supra* note 52. But see INTERNATIONAL FOUNDATION OF EMPLOYEE BENEFIT PLANS, 2013 EMPLOYER SPONSORED HEALTH CARE: ACA's IMPACT 22, Exhibit 26 (2013), available at <https://www.ifebp.org/pdf/research/2103ACAImpactSurvey.pdf> (reporting that 17% of surveyed employers said they were taking action in 2013 to avoid the 2018 Cadillac tax).

63. See Kirchen, *supra* note 52 ("Because the Cadillac tax is so unpopular with both political parties, insurance and benefits experts predict the tax will be repealed."); Edward A. Zelinsky, *The Health-Related Tax Provisions of PPACA and HCERA: Contingent, Complex, Incremental and Lacking Cost Controls*, N.Y.U. REV. EMP. BENEFITS & EXECUTIVE COMPENSATION § 7.02 (2010) (stating that the prognosis for the tax on "Cadillac" plans is at best uncertain).

64. LAURA TILLMAN & DAVID POPPER, TOWERS WATSON, HEALTH CARE REFORM: FOR EMPLOYERS, LOOMING FEARS MASK UNPRECEDENTED EMPLOYER OPPORTUNITIES TO MITIGATE COSTS, RISKS AND RESET TOTAL REWARDS 5 (2010), available at <http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2010/05/The-Impact-of-Health-Care-Reform-on-Employers>. Cf. Herring & Lentz, *supra* note 60, at

will be required to redesign their plans to avoid the tax. Eliminating spousal coverage for working spouses with access to health insurance through their own employers, however, is unlikely to be the sole, or even principal, means of avoiding the tax.<sup>65</sup>

#### IV. "REALIGNING THE WORKFORCE"

Reports abound that employers have reduced, or plan to reduce, the size of their workforces and/or their employees' hours in order to avoid the pay-or-play mandate.<sup>66</sup> Indeed, Maureen Groppe, a Gannett reporter, received the National Press Foundation's Freddie Award<sup>67</sup> for her report on how schools across the state of Indiana were cutting the hours of teachers' assistants, cafeteria workers, bus drivers, and other school aides to avoid the Affordable Care Act's employer mandate.<sup>68</sup>

Just how widespread this activity actually is is subject to debate.<sup>69</sup> According to a survey by the United States Chamber of Commerce and International Franchise Association, more than 50% of businesses with 40 to 70 employees will make personnel decisions intended to keep their workforces below the 50 full-time employee threshold.<sup>70</sup> In contrast, according to a survey by the International Foundation of Employee Benefit Plans, just under 20% of employers with 50 or fewer workers have or plan in the next 12 months to reduce their hiring to get or remain below the 50-employee threshold and/or adjust hours so that fewer employees qualify as full-time employees

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322, 326, Table 2 (assuming 6% premium growth, estimating that about 15% of plans will be subject to the tax in 2018 and by 2029, 75% of plans will be subject to the tax).

65. For a discussion of the ways in which employers may change their health care plans to avoid the Cadillac tax, see, for example, *FEDERAL HEALTH CARE REFORM: EXERCISE TAX ON HIGH-COST EMPLOYER PLANS 13* (American Academy of Actuaries & Society of Actuaries 2010); *BEHIND THE NUMBERS: MEDICAL COST TRENDS FOR 2011*, at 19 (Price-waterhouseCoopers' Health Research Institute 2010).

66. See, e.g., Reid Wilson, *Local governments cutting hours over Obamacare costs*, WASHINGTONPOST.COM, 2013 WLNR 20916009 (Aug. 23, 2013); Jed Graham, *Obama-Care Employer Mandate: A List Of Cuts To Work Hours, Jobs*, INVESTORS.COM (Dec. 19, 2013, 9:36 AM ET), <http://news.investors.com/politics-obamacare/121913-669013-obamacare-employer-mandate-a-list-of-cuts-to-work-hours-jobs.htm> (providing lengthy list of reported cuts).

67. *Star's Washington reporter wins national award*, INDIANAPOLIS STAR, A6, 2013 WLNR 32483217 (Dec. 29, 2013).

68. See Maureen Groppe, *SCHOOL AIDES' hours SLICED*, INDIANAPOLIS STAR, A1, 2013 WLNR 14114461 (June 7, 2013).

69. For estimates on the impact of the Affordable Care Act on the number of individuals with employment-based health insurance, see CBO AND JCT'S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE (Congressional Budget Office, March 2012).

70. Grace-Marie Turner, *6 Obamacare Realities for Businesses in 2014*, U.S. CHAMBER OF COMMERCE (Jan. 14, 2014, 5:45 PM), <https://www.uschamber.com/blog/6-obamacare-realities-businesses-2014>.

eligible for health insurance.<sup>71</sup> Not surprisingly, larger employers (defined as those with more than 50 employees)<sup>72</sup> were much less likely to report that they had or were going to reduce the size of their workforces in order to avoid the employer mandate.<sup>73</sup> Larger employers, however, were almost as likely to report that they had or planned to reduce work hours of individual employees to reduce the number of employees eligible for health insurance.<sup>74</sup>

Generally, employers' attempts to avoid the employer mandate may arise under five different scenarios:

- Scenario One: An employer with fewer than 50 employees and no health care plan may decide not to hire additional employees to keep its workforce below the 50 employee threshold.
- Scenario Two: An employer with more than 50 employees and no health care plan may decide to terminate some employees to keep its workforce below the 50 employee threshold.
- Scenario Three: An employer with more than 50 employees and no health care plan may decide to reduce the hours of some employees so those employees do not qualify as full-time employees. (In this scenario, the employer would not establish a health care plan but might pay a section 4980H(a) failure to cover penalty with respect its full-time employees.)<sup>75</sup>
- Scenario Four: An employer with more than 50 employees and an existing health care plan may decide to terminate some employees so the employer does not have to provide health care coverage with respect to those employees. (In this scenario, the

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71. INTERNATIONAL FOUNDATION OF EMPLOYEE BENEFIT PLANS, *supra* note 61, at 17, Exhibit 16. An April 2013 Gallup Poll of 603 small business owners reported similar findings. See Dennis Jacobo, *Half of U.S. Small Businesses Think Health Law Bad for Them*, GALLUP ECONOMY (May 10, 2013), <http://www.gallup.com/poll/162386/half-small-businesses-think-health-law-bad.aspx> (reporting that 19% of small business owners reduced the number of employees and 18% reduced the hours of employees to part-time).

72. See INTERNATIONAL FOUNDATION OF EMPLOYEE BENEFIT PLANS, *supra* note 61, at 17. The International Foundation of Employee Benefit Plans surveyed a wide cross section of employers ranging from those with fewer than 50 employees to those with more than 10,000 employees. Survey results on workforce adjustments were divided into two different categories: employers with 50 or fewer employees and employers with more than 50 employees.

73. See *id.* (reporting that 0.5% of surveyed large employers have reduced and another 0.5% plan within the next 12 months to reduce hiring to get or remain under the under 50-employee threshold).

74. See *id.* (reporting that 3.8% of surveyed large employers adjusted hours and another 11.5% of surveyed large employers plan to adjust hours within the next 12 months so fewer employees qualify for full-time employee status for health insurance).

75. As discussed above, an employer with more than 50 full-time employees that did not offer health insurance to its employees and dependents would be subject to a no-coverage penalty under section 4980H(a) if at least one of its full-time employees purchased subsidized health insurance on an exchange. See *supra* Section II.

employer would retain its health care plan and cover its remaining employees according to the terms of the plan.)

- Scenario Five: An employer with more than 50 employees and an existing health care plan may decide to reduce the hours of some of its employees so those employees do not qualify as full-time employees eligible for coverage.<sup>76</sup> (Under this scenario, the employer would again retain its health care plan and cover the remaining employees according to the terms of the plan.)

Commentators have suggested that such “workforce realignments” may run afoul of Section 510 of Employee Retirement Income Security Act (“ERISA”) and/or the Affordable Care Act’s whistleblower protection provision.<sup>77</sup> This section begins by analyzing possible Section 510 claims. It then turns to the Affordable Care Act’s whistleblower provision.

#### A. ERISA SECTION 510

Congress enacted Section 510 of ERISA<sup>78</sup> “primarily to prevent employers from discharging or harassing their employees in order to keep them from obtaining ERISA-protected benefits.”<sup>79</sup> Section 510’s “interference clause”<sup>80</sup> provides that “[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for . . . the purpose of interfering

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76. For purposes of determining whether an employer is an applicable large employer and thus subject to the penalty, the hours of part-time employees will be taken into account. I.R.C. § 4980H(c)(2)(E) (2011). For purposes of applying the penalty, only full-time employees will be taken into account. I.R.C. § 4980H(a)(2).

77. See, e.g., James M. Nelson, *The Patient Protection and Affordable Care Act, ERISA § 510 and the Next Generation of Benefits Litigation Concerns*, A.B.A. SEC. OF LABOR AND EMP’T LAW EMP. BENEFITS COMM. NEWSLETTER (Spring 2013), [http://www.americanbar.org/content/newsletter/groups/laborLaw/ebc\\_newsletter/13\\_spr\\_ebcnews/ppaca.html](http://www.americanbar.org/content/newsletter/groups/laborLaw/ebc_newsletter/13_spr_ebcnews/ppaca.html); James R. Napoli, *The View from Proskauer: Health Care Reform Litigation Risks – The Intersection of ERISA Section 510 and the Affordable Care Act’s Whistleblower Provisions*, PROSKAUER’S ERISA PRACTICE CENTER BLOG, (May 31, 2013), <http://www.erisapracticecenter.com/2013/05/31/the-view-from-proskauer-health-care-reform-litigation-risks-the-intersection-of-erisa-section-510-and-the-affordable-care-acts-whistleblower-provisions/>; Adam C. Solander & Kara M. Maciel, *Where ERISA And The Affordable Care Act Collide*, LAW360 (Dec. 5, 2013, 3:48 PM), <http://www.ebgilaw.com/publications/where-erisa-and-the-affordable-care-act-collide-as-appeared-in-law-360/>.

78. 29 U.S.C. § 1140 (2012).

79. *Kowalski v. L & F Prods.*, 82 F.3d 1283, 1287 (3d Cir. 1996). See also *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) (stating that the purpose of section 510 is to “prevent persons and entities from taking actions which might cut off or interfere with a participant’s ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan”).

80. ERISA Section 510 contains three other prohibitions: (1) an exercise clause, (2) a whistleblower provision, and (3) a multiemployer plan provision. An employer’s decision to reduce the size of its workforce or its employees’ hours to avoid the employer mandate only gives rise to concerns under the interference clause.

with the attainment of any right to which such participant may become entitled under the plan, [ERISA], or the Welfare and Pension Plans Disclosure Act.”<sup>81</sup> This provision was viewed as a “crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.”<sup>82</sup>

### 1. *Individuals Protected by Section 510*

By its terms, Section 510 prohibits an employer from taking adverse employment action against a “participant” or “beneficiary.” Section 3(7) of ERISA defines a participant as “any employee or former employee of an . . . employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.”<sup>83</sup> Section 3(8) of ERISA defines a beneficiary as a “person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.”<sup>84</sup>

Determining whether an individual is a “participant” protected by ERISA Section 510 gives rise to two separate questions. First, is the individual an employee or former employee? Second, if the individual is an employee or former employee, is the individual or may the individual become eligible to receive a benefit from an employee benefit plan?

Under Scenario One, two different types of individuals may seek to challenge the employer’s failure to hire them: (1) an individual who has never worked for the company, and (2) a former employee who is seeking to be rehired. An individual who has never worked for the company would be neither an employee nor a former employee and thus clearly would not qualify as a participant protected by ERISA Section 510. Whether a former employee seeking reemployment would qualify as a participant entitled to protection under ERISA Section 510 requires a little more analysis.

Although the United States Supreme Court has never addressed the question of who is a participant for purposes of Section 510, the Court in *Firestone Tire and Rubber Co. v. Bruch*<sup>85</sup> addressed the question of who is a participant for purposes of ERISA’s disclosure rules.<sup>86</sup> In that case, the Court declared that “the term ‘participant’ is naturally read to mean either ‘employees in, or reasonably expected to be

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81. ERISA § 510, 29 U.S.C. § 1140 (2012).

82. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990).

83. ERISA § 3(7), 29 U.S.C. § 1002(7) (2014).

84. ERISA § 3(8), 29 U.S.C. § 1002(8).

85. 489 U.S. 101 (1989).

86. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 105 (1989).



in, currently covered employment,' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits."<sup>87</sup> The Court further announced that "[i]n order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."<sup>88</sup>

The United States Court of Appeals for the Third Circuit in *Becker v. Mack Trucks, Inc.*<sup>89</sup> relied on the Supreme Court's *Firestone* decision to determine whether former employees who sought to be rehired had standing to bring a claim under Section 510. The court held that former employees with vested pension benefits had standing as "participants" under Section 510 because they satisfied the second element of the *Firestone* test that they have "a colorable claim" to vested benefits.<sup>90</sup> The court, however, held that former employees whose pension benefits were not vested at the time that their employment was terminated did not have standing as participants under Section 510. The court first found that the employees, who were covered by a collective bargaining agreement, did not satisfy the first element of the test, that they have a reasonable expectation of returning to covered employment, because their recall rights had expired or been waived.<sup>91</sup> The court then found that they did not satisfy the second, colorable claim to vested benefits, element because their past service "gave rise to a 'forfeitable benefit' and that such a 'contingent claim for future benefits does not satisfy the dictates of *Firestone*'."<sup>92</sup> According to the court, "a legally unenforceable claim to *contingent* benefits cannot establish a colorable claim to *vested* benefits under *Firestone*."<sup>93</sup>

If a court were to apply the *Becker* analysis, it appears that former employees under Scenario One would rarely, if ever, have standing as participants. First, absent special circumstances, former employees are unlikely to have a reasonable expectation of returning to covered employment. Second, because the employer has no plan in

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87. *Firestone*, 489 U.S. at 117 (citations omitted).

88. *Id.* at 117-18.

89. 281 F.3d 372 (3d Cir. 2002).

90. *Becker v. Mack Trucks, Inc.* 281 F.3d 372, 377 (3d Cir. 2002). The court, however, rejected their claims on the merits because, according to the court, section 510 does not encompass the decision to hire or rehire. *Becker*, 281 F.3d at 379-83. For a critique of this aspect of the court's decision, see *Becker v. Mack Trucks, Inc.: Third Circuit Holds that Refusal to Rehire Participant Never Violates Section 510*, 10 NO. 1 ERISA LITIG. REP. (Newsl.) 13 (April 2002).

91. *Becker*, 281 F.3d at 377-78.

92. *Id.* at 378 (quoting *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652, 657 (3d Cir. 1993)).

93. *Id.* at 379 (emphasis added).

Scenario One, former employees would not be able to establish a colorable claim to vested benefits.

Neither ERISA nor the Affordable Care Act requires an employer to establish a health care plan. The Affordable Care Act may *encourage* employers to establish health care plans by imposing a penalty, or excise tax, on applicable large employers that fail to offer an affordable health care plan to their employees.<sup>94</sup> It does not, however, *require* employers to establish such plans. Employers, under the Affordable Care Act, are free to pay the penalty rather than establish a plan. Thus, former employees under Scenario One would not be able to establish a colorable claim to vested health benefits because the employer does not have a plan.

Similar reasoning would apply to former employees under Scenario Two. The employer has no health care plan. Thus, former employees would not be able to establish a colorable claim to vested health care benefits.

Scenario Three involves a reduction in hours rather than a termination of employment. Thus, employees with reduced hours would remain active employees and the former employee analysis of *Firestone/Becker* would not apply. Nevertheless, employees with reduced hours are unlikely to be able to establish that their employer's reduction in their hours interfered with any right to which they might become entitled under the plan or ERISA. Just as in Scenarios One and Two, there is no plan. Thus, the employer's reduction in their hours would not interfere with any right to which they may become entitled under a plan. In addition, because neither ERISA nor the Affordable Care Act require that an employer establish a plan, an employer's reduction in their hours would not interfere with a right or potential right under a plan. Rather, it would simply relieve the employer of a potential excise tax liability under section 4980H of the Internal Revenue Code.

Unlike in the first three scenarios, there is a plan in Scenarios Four and Five. The two scenarios differ in that Scenario Four involves a termination of employment while Scenario Five involves a reduction in hours.

If the *Firestone/Becker* test for standing of former employees were applied to Scenario Four, few, if any, former employees would have standing. As noted above, under this test, a former employee must have a reasonable expectation of returning to covered employment or

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94. How effective the pay-or-play penalty will be in light of the relatively low cost of the penalty compared to the high cost of employer-provided health care coverage is subject to debate. See Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 NEB. L. REV. 885, 906-12 (2011).

a colorable claim to vested benefits. Absent special circumstances, former employees are unlikely to have a reasonable expectation of returning to covered employment. In addition, absent special circumstances, former employees are unlikely to have a colorable claim to *vested* health benefits. ERISA's vesting rules apply to pension plans,<sup>95</sup> not welfare plans.<sup>96</sup> Thus, absent a promise on the part of the employer to vest benefits under its health care plan,<sup>97</sup> former employees will not have a colorable claim to *vested* health benefits.

A strong argument, however, can be made that standing under ERISA Section 510 should not be limited to former employees with a colorable claim to *vested* benefits. As the Supreme Court held in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Railway Company*,<sup>98</sup> Section 510 protection is not limited to pension benefits. Rather, it extends to welfare benefits as well.<sup>99</sup> Thus, at least in the context of a welfare benefit claim, standing for former employees should not be limited to those who can establish a colorable claim to *vested* welfare benefits.<sup>100</sup> Instead, former employees who can establish a colorable claim to *any* welfare benefit<sup>101</sup> should have standing.<sup>102</sup>

Recognizing that the Supreme Court's definition of the term participant in *Firestone* "developed outside of the standing context,"<sup>103</sup> several circuit courts<sup>104</sup> have applied a "but for test" to determine

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95. ERISA § 203, 29 U.S.C. § 1053 (2014).

96. ERISA § 201, 29 U.S.C. § 1051 (2014).

97. Claims to vested welfare benefits arise most commonly with respect to retiree health benefits. See Kathryn L. Moore, *The New Retiree Health VEBAs*, NYU REV. OF EMP. BENEFITS AND EXEC. COMP. 7-1, 7-12 to 7-14 (2008) (discussing cases involving claims to vested retiree health benefits).

98. 520 U.S. 510 (1997).

99. *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 514-15 (1997).

100. Indeed, the court in *Becker* left open the possibility that it might apply a different rule to Section 510 claims with respect to welfare benefits when it distinguished *Inter-Modal* on the ground that it concerned welfare benefits that do not vest. *Becker*, 281 F.3d at 379.

101. See ERISA § 3(7), 29 U.S.C. § 1002(7) (defining participant as "any employee or former employee . . . who is or may become eligible to receive a benefit of *any type* from an employee benefit plan") (emphasis added).

102. The Court in *Inter-Modal* remanded the case for the lower court to address the employer's argument that when applied to welfare benefits that do not vest, section 510 "only protects an employee's right to cross the 'threshold of eligibility' for welfare benefits." *Inter-Modal*, 520 U.S. at 516-17.

103. *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1410 (6th Cir. 1996) (citing *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995)) (internal citation omitted).

104. See, e.g., *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 743 (9th Cir. 1999); *Shahid*, 76 F.3d at 1410; *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992). See also *Jones v. Allen*, No. 2:11-cv-380, 2014 WL 347035, at \*6 (S.D. Ohio, Jan. 30, 2013) (applying "but for" test).

whether a former employee has standing under Section 510.<sup>105</sup> Under this “but for” test, “a former employee has standing as a ‘participant’ where, but for the alleged misrepresentations or breaches of duty by fiduciaries, the employee ‘would have been in a class eligible to become a member of the plan.’”<sup>106</sup>

Under the “but for” test, whether a former employee would have standing in Scenario Four depends on the terms of the plan. If the former employee would have been eligible for coverage under the terms of the plan but for the termination of his employment, the employee would have standing under Section 510. If, however, the former employee would not have been eligible to participate under the terms of the plan, the employee would not have standing.

Although Scenario Five involves a reduction in hours rather than a termination in employment, a similar analysis should apply. If, but for the reduction in hours, an employee would have been eligible for coverage under the terms of the plan, the employee should have standing under Section 510. If, on the other hand, the employee would not have been eligible to participate under the terms of the plan, even if the employee’s hours had not been reduced, the employee should not have standing.

This is not to suggest that an employer may avoid liability under Section 510 without penalty by drafting its plan to exclude a large swath of its full-time workforce. If an employer drafts its plan so that it does not cover at least 95% of its full-time employees,<sup>107</sup> the employer will be subject to the section 4980H(a) of the Internal Revenue Code’s failure to cover penalty even if the employer provides affordable coverage to most of its full-time workers.

## 2. *Employer’s Intent*

Section 510 prohibits an employer from taking adverse employment action “for the purpose of” interfering with a participant’s attainment of a right under a plan.<sup>108</sup> Thus, an employer is only subject to liability under Section 510 if the employer had “specific intent” to engage in a prohibited activity.<sup>109</sup>

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105. Without deciding when, if ever, the “but for” test should apply, the court in *Becker* found that the former employees did not have standing under the “but for” test because “Mack’s refusal to rehire former employees did not ‘in and of itself’ strip them of their employee status.” *Becker*, 281 F.3d at 378.

106. *Shahid*, 76 F.3d at 1410-11 (quoting *Swinney*, 46 F.3d at 519).

107. See *supra* Section II and accompanying text.

108. 29 U.S.C. § 1140 (2012).

109. See, e.g., *Hamilton v. Starcom Mediavest Grp., Inc.*, 522 F.3d 623, 628 (6th Cir. 2008); *McGann v. H & H Music Co.*, 946 F.2d 401, 404 (5th Cir. 1991), *cert. denied*, 506 U.S. 981 (1992); *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989), *cert.*

Typically, direct proof of specific intent to engage in a prohibited activity is hard to come by.<sup>110</sup> In the case of the employer mandate, however, there are widespread reports of employers stating that they have or plan to terminate employees or reduce their hours in order to avoid the pay-or-play mandate.<sup>111</sup> To the extent that such terminations or reductions in hours prevent employees from participating under the terms of an existing health care plan, such admissions would likely qualify as direct proof of specific intent. Indeed, two attorneys have advised employers to "avoid making public statements on employment or health benefits strategy"<sup>112</sup> and to be careful in their internal communications in order to protect against Section 510 liability.<sup>113</sup>

Absent direct proof of specific intent, courts apply a three-step burden-shifting process similar to that applied in Title VII cases to determine liability under Section 510.<sup>114</sup> Under this three-step process, the plaintiff must first establish a *prima facie* case by showing (1) that the employer engaged in prohibited conduct, (2) that was taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled.<sup>115</sup> If the plaintiff establishes her *prima facie* case, the burden shifts to the employer to produce evidence supporting a legitimate nondiscriminatory reason for the action.<sup>116</sup> The employer need not prove, but must simply articulate, a legitimate nondiscriminatory reason for the adverse employment action.<sup>117</sup> If the employer satisfies its burden, the burden shifts back to the plaintiff to show, by a preponderance of the evidence, that the proffered reason was a pretext.<sup>118</sup>

Former and current employees with standing under Scenarios Four and Five should have little difficulty establishing the third element of a *prima facie* case.<sup>119</sup> If, as discussed above, an employee has

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*denied*, 498 U.S. 814 (1990); *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

110. See *Gavalik*, 812 F.2d at 852 (stating that "[i]n most cases, . . . specific intent will not be demonstrated by 'smoking gun' evidence").

111. See *supra* note 64 (citing relevant authorities).

112. Adam C. Solander & Elizabeth B. Bradley, *Trying to Avoid ACA Mandate? ERISA 510 May Catch You*, LAW360 (Aug. 22, 2013), <http://www.law360.com/articles/464969/trying-to-avoid-aca-mandate-erisa-510-may-catch-you>.

113. *Id.*

114. SECTION OF LABOR AND EMPLOYMENT LAW AMERICAN BAR ASSOCIATION, EMPLOYEE BENEFITS LAW 15-81 to 15-82 (Jeffrey Lewis, et al. eds., 3d ed. 2012) [hereinafter Employee Benefits Law]. See, e.g., *Gavalik*, 812 F.2d at 852-53.

115. See, e.g., *id.* at 852.

116. See, e.g., *id.* at 853.

117. See, e.g., *Dister v. Cont'l Grp., Inc.*, 859 F.2d 1108, 1115 (2d Cir. 1988).

118. See, e.g., *Gavalik*, 812 F.2d at 853.

119. Cf. *Schlett v. Avco Fin. Svcs., Inc.*, 950 F. Supp. 823, 834 (N.D. Ohio 1996) (finding plaintiff failed to offer sufficient proof to support her claim that employer's deci-

standing, the employee necessarily can show that he or she would have become entitled to health care coverage but for the prohibited conduct.

Former employees in Scenario Four should also have little difficulty establishing the first element: the employer engaged in prohibited conduct. Indeed, the Supreme Court of the United States has declared that “[b]y its terms § 510 protects plan participants from *termination* motivated by an employer’s desire to prevent a pension from vesting.”<sup>120</sup> Although there is less direct precedent on the issue,<sup>121</sup> a termination in hours, particularly if accompanied by a reduction in pay, should also constitute prohibited employer conduct.<sup>122</sup>

Whether a former or current employee can satisfy the second element, that the prohibited conduct was taken for the purpose of interfering with the employees’ right to coverage, depends on the evidence available and the quantum of proof the court requires.<sup>123</sup>

Assuming that the former or current employee can establish a *prima facie* case, whether the employee would ultimately prevail depends on whether the employer can produce a legitimate, non-pretextual reason for terminating the employee or reducing the employee’s hours.

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sion to reduce employee to part-time status was motivated by desire to interfere with her ERISA benefits). A reduction in hours that leads to a reduction in compensation constitutes an adverse employment action for purposes of Title VII. See *Holland v. Washington*, 487 F.3d 208, 219 (4th Cir. 2007). See also *Points to Remember*, 34 EMPLOYEE TERMINATIONS LAW BULLETIN 5 (Nov. 2013) (describing settlement in case in which the Equal Employment Opportunity Commission (“EEOC”) treated reduced hours as an adverse employment action for purposes of Title VII).

120. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990) (emphasis added).

121. The court in *Schlett* treated a reduction in hours to part-time status as employer conduct protected by Section 510. Nevertheless, it rejected the employee’s claim due to insufficient proof. *Schlett*, 950 F. Supp. at 835.

122. In *Burlington Northern and Santa Fe Railway Co. v. White*, the Supreme Court established the standard for determining what constitutes adverse employment action for retaliation purposes under Title VII. 548 U.S. 53 (2006). Specifically, the Court defined adverse employment action as action that “would have been materially adverse to a reasonable employee or job applicant.” *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). A reduction in hours that leads to a reduction in compensation would clearly appear to be materially adverse to a reasonable employee. *Cf. Points to Remember*, 34 Employee Terminations Law Bulletin 5 (Nov. 2013) (describing settlement in case in which EEOC treated reduction in hours as an adverse employment action for purposes of Title VII).

123. See Employee Benefits Law, *supra* note 113, at 15-80 to 15-81, n.619, n.619-20 (Jeffrey Lewis et al. eds., 3d ed. 2012) (citing and describing Section 510 decisions regarding quantum of proof necessary to establish *prima facie* case and establish proffered reason is pretext).

## B. ACA WHISTLEBLOWER PROVISION

Section 1558 of the Affordable Care Act, commonly referred to as the ACA whistleblower provision,<sup>124</sup> prohibits an employer from, among other things, “discharg[ing] or in any manner discriminat[ing] against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an employee acting at the request of the employee) has received”<sup>125</sup> a premium tax credit or subsidy under the Affordable Care Act for health insurance purchased through an exchange.<sup>126</sup> This provision is codified at 29 U.S.C. § 218c as Section 18C of the Fair Labor Standards Act.

The preamble to the Department of Labor’s (“DOL’s”) interim final regulation explains “the relationship between the employee’s receipt of a credit and the potential tax penalty imposed on an employer could create an incentive for an employer to retaliate against an employee. Section 18C protects employees against such retaliation.”<sup>127</sup>

As an anti-retaliation statute, the ACA whistleblower provision differs fundamentally from the ERISA Section 510 interference clause. It prohibits employers from retaliating against employees *after* they have exercised their rights under the Affordable Care Act to *purchase subsidized health insurance* through an exchange. The ERISA Section 510 interference clause,<sup>128</sup> in contrast, prohibits employers from *preventing* employees from *exercising their rights under a plan* or under ERISA.

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124. See, e.g., Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. 13222-01, 13222 (Feb. 27, 2013) (referring to provision as “the employee protection (whistleblower) provision of section 1558 of the Affordable Care Act”).

125. 29 U.S.C. § 218c (2012).

126. The ACA whistleblower provision also contains four other prohibitions, including a prohibition against discriminating against employees for providing information to the government about potential violations of the Affordable Care Act. For a brief overview of the provision, see Nancy Bloodgood & Lucy C. Sanders, *An Overview of the Anti-Retaliation Provision in the New Patient Protection and Affordable Care Act*, 58-DEC. FED. LAW. 32 (2011).

127. Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. at 13223 (to be codified at 29 C.F.R. pt. 1984).

128. Section 510 of ERISA also includes an anti-retaliation provision. Claims under the ERISA Section 510 anti-retaliation provision and the ACA whistleblower anti-retaliation provision are mutually exclusive. For a claim to arise under the ERISA Section 510 anti-retaliation provision, the employee must have exercised his right to benefits under the employer’s plan. If an employee is covered by an employer-sponsored health care plan, then the employee is not eligible for subsidized coverage under a health insurance exchange and thus an employer cannot have retaliated against the employee for exercising his rights to subsidized coverage under an exchange.

### 1. Preemptive Workforce Realignments

The ACA whistleblower provision expressly protects employees who have “received” a premium tax credit or subsidy for health insurance purchased through an exchange.<sup>129</sup> The DOL’s interim final regulations state that the provision “provides protection for an employee from retaliation *because* the employee *has received* a credit under Section 36B of the [IRC], or a cost-sharing reduction (referred to as a ‘subsidy’ in section 18C) under the Affordable Care Act section 1402.”<sup>130</sup> Thus, like all anti-retaliation provisions, the ACA whistleblower provision, by its terms, is reactive in nature.<sup>131</sup> It only applies *after* “protected activity” has occurred, that is, after an employee has purchased subsidized health insurance through an exchange.

Thus, on its face, the ACA whistleblower provision would not apply to any of the five scenarios described above unless the employer declined to hire the individual, terminated the employee’s employment, or reduced the employee’s hours *after* the employee purchased subsidized health insurance through an exchange. Commentators, however, have suggested that the ACA whistleblower provision might apply to “preemptive strikes,” that is, workforce realignments that occur before an employee purchases health insurance through an exchange.<sup>132</sup>

129. 29 U.S.C. § 218c(a)(1).

130. Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. at 13231 (adding 29 C.F.R. § 1984.100(a)) (emphasis added). Section 1984.102(b)(1) contains substantially similar language. See Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. at 13232 (adding 29 C.F.R. § 1984.102(b)(1) (providing, “An employee is protected against retaliation *because* the employee (or an individual acting at the request of the employee) *has*: (1) *Received* a credit under section 36B of the Internal Revenue Code of 1986, 26 U.S.C. section 36B or a subsidy under section 1402 of the Affordable Care Act, 42 U.S.C. 18071.”) (emphasis added).

131. Cf. Charlotte S. Alexander, *Anticipator Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L. J. 779, 790 (2013) (noting that all anti-retaliation provisions are reactive).

132. See Andrea L. Ben-Yosef, *Implementing, Avoiding ACA Can Expose Employers to Litigation Claims, Speaker Says*, BLOOMBERG BNA (Dec. 17, 2013), <http://www.bna.com/implementing-avoiding-aca-n17179880775/> (“A question for the court is whether a preemptive strike by an employer is actionable, Napoli said, because the employer reduced the hours before the employee received the subsidy. This will be played out in the courts, he said.”); James Napoli & Brian Neulander, *The View From Proskauer: Health Care Reform Litigation Risks – The Intersection of ERISA Section 510 and the Affordable Care Act’s Whistleblower Provisions*, THE ERISA LITIGATION NEWSLETTER (June 2013), <http://www.proskauer.com/publications/newsletters/erisa-litigation-newsletter-june-2013/> (“The ACA whistleblower issue is whether [the reduction of an employee’s hours so that the employee would not have coverage and not be full-time] would be prohibited by being viewed as reducing hours of work in anticipation of the employee receiving a subsidy to purchase insurance via an exchange and in an effort to avoid a penalty with respect to the employee.”). But see Timothy P. Brechtel & Ricardo X. Carlo, *‘Play or pay’ and whistleblower protections under healthcare reform*, LOUISIANA



Not surprisingly, no reported case has yet addressed the question of whether the ACA whistleblower provision applies to preemptive workforce realignments.<sup>133</sup> Moreover, the legislative history of the ACA whistleblower provision is sparse<sup>134</sup> and thus does not provide any clear guidance on whether a court should interpret the provision broadly so as to apply to preemptive workforce realignments. Nevertheless, it seems that the ACA whistleblower provision should not ap-

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EMPLOYMENT LAW LETTER (April 25, 2013) (contending that it would be difficult to show cause and effect between an employer's actions and an employee's exercise of his protected rights before the pay-or-play mandates become effective and the exchanges become operational).

133. At the time this Article went to press, a Westlaw search identified eight cases citing this provision. See *Jallali v. USA-Funds W. Asset Mgmt. Inc. and Son Healthcare Grp.*, No. 11-62510-CIV, 2012 WL 3291873 (S.D. Fla. Aug. 13, 2012) (dismissing complaint for failure to exhaust administrative remedies); *Rosenfield v. Globaltranz Ent., Inc.*, CV 11-02327-PHX-NVW, 2012 WL 2572984 (D. Ariz. July 2, 2012) (holding that "this title" in 29 U.S.C. § 218c refers to title I of the ACA, not title 29 of the U.S.C.); *Falk v. City of Glendale*, No. 12-v-00925-JLK, 2012 WL 2390556, n.11 (D. Colo. June 25, 2012) (citing 29 U.S.C. § 218c in support of proposition that "if Plaintiff's opposition centered not on discrimination, but on workplace conditions, then she must consider whether an FLSA retaliation claim provides an appropriate remedy"); *Jean-Louis v. Metro. Cable Comms. Inc.*, 838 F. Supp. 2d 111, 120 n.5 (S.D.N.Y. 2011) (noting that the FLSA anti-retaliation provision also uses the term "employer"); *Daugherty v. Encana Oil & Gas (USA) Inc.*, No. 10-cv-02272-WJM-KLM, 2011 WL 2791338 (D. Colo. July 15, 2011) (noting that plaintiff brought claim under 29 U.S.C. § 218c, among other counts, but staying complaint and granting motion for mandatory arbitration); *Wiley v. Asplundh Tree Expert Co.*, No. 2:13-CV-02952, 2014 WL 1017208 (S.D. W. Va. Mar. 17, 2014) (deciding portion of wrongful discharge claim based on overtime pay violations was preempted by FLSA); *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (6th Cir. 2014) (citing Section 218c in affirming summary judgment for employer on Employee Retirement Income Security Act (ERISA) claim because whistleblower claim was preempted); *Richter v. Design at Work*, No. 14-CV-650, 2014 WL 3014972 (E.D.N.Y. July 3, 2014) (noting that "[i]t is unclear from the fact of Section 218(c)(5) whether 'this title' refers to Title XXIX of the United States Code, which relates generally to labor, or to Title I of the PPACA" but deciding that even "if [the plaintiff's] claim fell within the protections of Section 218c, that provision requires a plaintiff to exhaust administrative remedies before filing a civil action in court").

134. The legislative history of the Affordable Care Act is lengthy and convoluted. See John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 132 (2013). ProQuest Congressional, which houses one of the most robust collections of the ACA legislative history, identifies twenty-five separate bills that were considered in the enactment of the Affordable Care Act. *Id.* at 134. Two of those bills, 111 H.R. 3200 and H.R. 3692, contain a whistleblower provision, 111 H.R. 3200 § 153 and 111 H.R. 3962 § 253. The whistleblower provisions in those bills, however, do not contain a protection for employer retaliation against employees who purchase subsidized health insurance on an Exchange. Rather, this particular protection first appears as Section 1558 of the November 19, 2009 Senate amendment to 111 H.R. 3590. S. Amend. 2786, 111th Cong. (2009) (enacted). Because the provision first appears as an amendment, there is no committee report explaining the reason for this provision. See Cannan, 105 LAW LIBR. J. at 160, 164 (explaining that White House officials and Democratic congressional leaders worked outside the traditional legislative process using budget reconciliation to pass the eventual ACA).

ply to an employer's decision to reduce the size of its workforce to avoid the pay-or-play mandate.

In enacting the Affordable Care Act, Congress elected to impose the pay-or-play penalty on "applicable large employers."<sup>135</sup> The Affordable Care Act defines "applicable large employers" as employers with 50 or more full-time employees,<sup>136</sup> and it defines the term "full-time employee" as an employee who works 30 or more hours per week.<sup>137</sup> The Affordable Care Act does not, however, mandate an employer's size. Employers should be free to determine the size of their workforces and avoid application of the pay-or-play mandate if they so desire.<sup>138</sup> Thus, the ACA whistleblower provision should not apply to an employer's business decision to reduce the size of its workforce so as to avoid application of the pay-or-play mandate.

## 2. Individualized Preemptive Strikes

The ACA whistleblower provision raises another, more difficult, preemptive strike issue. Suppose that an employer threatens to terminate an employee if the employee purchases subsidized health insurance through an exchange. Does the mere threat of termination violate the ACA whistleblower provision if the employee does not purchase subsidized insurance?

Arguably, the anti-retaliation provision should apply in such a case. If the statute protects employees who actually lose their jobs because they purchase subsidized health insurance, then a fortiori, it should also protect employees who are even more vulnerable and forego subsidized health insurance for fear of losing their jobs.<sup>139</sup>

The plain language of the statute does not support such an interpretation. Nor do the regulations. Rather, according to the plain text, the ACA whistleblower provision only applies *after* an employee purchases insurance on an exchange. An advocate, however, might point to some, albeit limited, authority in other contexts to support such a claim.

First, in *Sauers v. Salt Lake County*,<sup>140</sup> the United States Court of Appeals for the Tenth Circuit held that Title VII of the Civil Rights

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135. I.R.C. § 4980H(a)-(b).

136. I.R.C. § 4980H(c)(2).

137. I.R.C. § 4980H(c)(4).

138. Cf. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003) (beginning decision with the proposition that the American with Disabilities Act, like other federal anti-discrimination provisions, is inapplicable to very small employers and determining whether particular individuals qualified as employees for purposes of determining whether employer was subject to the Act).

139. Cf. Alexander, *supra* note 130 (arguing that employment anti-retaliation statutes should be stretched to protect the vulnerable "brown collar" workforce).

140. 1 F.3d 1122 (10th Cir. 1993).

Act protects against preemptive retaliations.<sup>141</sup> In that case, the plaintiff claimed that she was transferred two days after her employer engaged in prohibited sexual harassment in order to prevent her from filing a sexual harassment charge. The court declared that “[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.”<sup>142</sup>

Similarly, in *Parexel International LLC and Theresa Neuschafer*,<sup>143</sup> the National Labor Relations Board (“Board”) decided that terminating an employee as “a pre-emptive strike to prevent her from engaging in an activity protected by the [National Labor Relations] Act [(“NLRA”)]”<sup>144</sup> violates the NLRA.<sup>145</sup> In that case, an employee told her supervisor that she believed that South African employees were receiving higher wages and other favorable treatment and that “the whole unit should quit and come back with a raise.”<sup>146</sup> About a week later, management met with the employee and asked, among other things, whether she had discussed her concerns with anyone else. The employee advised management that she had not, and shortly thereafter, she was terminated. The employer claimed that it had not violated the NLRA because the employee had not engaged in “concerted activity” (discussed her wage concerns with any other employees) before she was terminated. The Board found that an employee need not have engaged in concerted activity before she may be

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141. *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1128 (10th Cir. 1993). *Sauers* has been cited with approval for this proposition on a few occasions. See *EEOC v. Cognis Corp.*, No. 10-CV-2182, 2012 WL 1893725 (C.D. Ill. May 23, 2012) (finding a genuine issue of material fact as to whether employer engaged in preemptively retaliating against employees in violation of Title VII when employer required employees to sign last chance agreements (LCAs) as a condition of continued employment when LCAs threatened termination if an employee engaged in statutorily protected activity); *EEOC v. Bojangles*, 284 F. Supp. 2d 320, 328 (M.D. N.C. 2003) (describing as its first interpretive principle that Title VII’s retaliation provision encompasses anticipatory retaliation); *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (rejecting plaintiff’s estoppel defense and stating that the threat of firing employee if she sued would be form of anticipatory retaliation under Title VII).

142. *Sauers*, 1 F.3d at 1128. The court nevertheless found that the trial court’s finding that the employer rebutted any inference of discrimination was supported by the evidence and not clearly erroneous. *Id.* at 1128-29.

143. 356 N.L.R.B. No. 82 (Jan. 28, 2011). For an extensive discussion of the case, see Michael C. Duff, *New Nip in the Bud: Does the Obama Board’s Preemptive Strike Doctrine Enhance Tactical Employment Law Strategies?*, 16 EMP. RTS. & EMP. POL’Y J. 143 (2012).

144. *Parexel Int’l, LLC and Theresa Neuschafer*, 356 N.L.R.B. No. 82, at \*2 (Jan. 28, 2011).

145. Courts have cited *Parexel* with apparent approval on a couple of occasions. See *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 790 (8th Cir. 2013); *Greater Omaha Packing Co.*, 17-CA-08735, 2012 WL 6755114 (N.L.R.B. Div. Judges Dec. 27, 2012).

146. *Parexel*, 356 N.L.R.B. No. 82, at \*1.

protected by the NLRA. According to the Board, “[i]f an employer acts to prevent concerted protected activity—to ‘nip it in the bud’—that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more.”<sup>147</sup>

These cases offer some support for the proposition that the ACA whistleblower provision should apply to preemptive threats.<sup>148</sup> Nevertheless, there is strong countervailing authority that the scope of the provision should be limited according to its express terms.

Although the Supreme Court has taken an expansive approach to anti-retaliation statutes in recent years,<sup>149</sup> it has not completely unmoored its decisions from the statutory text. Rather, the Court has begun its analyses by carefully considering the text of the statute before adopting an expansive reading of the statute. Indeed, according to one commentator, “[n]owhere is the emphasis on text more apparent than in the Court’s interpretation of antiretaliation provisions.”<sup>150</sup>

For example, in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>151</sup> the Court held that retaliation under Title VII of the Civil Rights Act need not affect the terms, conditions, or benefits of employment to be actionable. Rather, “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”<sup>152</sup> In so holding, the Court carefully considered the text of the statute. Specifically, the Court began its analysis by quoting the text of the provision and comparing it with the text of Title VII’s antidiscrimination provision.<sup>153</sup> It noted that the antidiscrimination provision included language, such as “hire,” “discharge,” “compensation, terms, conditions of employment,” that limited the scope of the provision while no such limiting language was contained in the anti-retalia-

147. *Id.* at \*5.

148. Although *Sauers* and *Parexel* offer expansive interpretations, many lower courts take a narrower, textual approach to preemptive strike claims under anti-retaliation statutes. See Alexander, *supra* note 130, at 790-92; Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 561-63 (2011). For example, in *Hill v. Mr. Money Finance Co.*, the Northern District of Ohio dismissed an employee’s retaliation claim under the Title 31 whistleblower provision, 31 U.S.C. § 5328, because the employee was fired before he had acted on his threat to file a complaint under the Federal Deposit Insurance Act. 491 F. Supp. 2d 725, 735-36 (N.D. Ohio 2007).

149. For a more detailed discussion of these cases and anti-retaliation jurisprudence in general, see Long, *supra* note 147; Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010).

150. Long, *supra* note 147 at 531.

151. 548 U.S. 53 (2006).

152. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).

153. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 61-62.

tion provision.<sup>154</sup> Only after carefully studying the text of the statute did the Court turn to Congressional purpose to support a difference between the antidiscrimination and anti-retaliation provisions with respect to the scope of protection.<sup>155</sup>

In *Kasten v. Saint-Gobain Performance Plastics Corp.*,<sup>156</sup> the Court held that the Fair Labor Standards Act's ("FLSA") retaliation protection extends to employees who make oral as well as written complaints. In that case, the Court again began with the text of the statute,<sup>157</sup> which forbids employers "to discharge or in any manner discriminate against any employee because such employee has *filed any complaint*."<sup>158</sup> After finding that the term "filed" is not susceptible to a single meaning,<sup>159</sup> the Court considered, among other things, the Act's basic objectives<sup>160</sup> in determining that the term should include oral as well as written complaints.

In *Thompson v. North American Stainless, LP*,<sup>161</sup> the Court held that Title VII anti-retaliation protection extends to third parties, specifically an employee's fiancé who was fired after the employee filed a sex-discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The Court again began its analysis by quoting the text of the statute: "a civil action may be brought . . . by the person claiming to be aggrieved."<sup>162</sup> Finding that the language could support a number of different interpretations, the Court applied the Administrative Procedure Act approach of authorizing suit by "any person . . . adversely affected or aggrieved . . . within the meaning of the relevant statute."<sup>163</sup>

The DOL has taken a similar textual approach in its regulations implementing the ACA whistleblower provision. As noted above, the regulations follow the statutory text in stating that the provision "provides protection . . . because the employee has received" subsidized

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154. *Id.* at 62.

155. *Id.* at 63 (declaring that "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status" while "[t]he antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees").

156. 131 S. Ct. 1325 (2011).

157. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011) (stating, "[w]e begin with the text of the statute").

158. *Kasten*, 131 S. Ct. at 1329 (quoting 29 U.S.C. § 215(a)(3)) (emphasis added).

159. *Id.* at 1331-33.

160. *Id.* at 1333-34.

161. 131 S. Ct. 863 (2011).

162. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011) (quoting 42 U.S.C. § 2000e-5(f)(1)).

163. *Thompson*, 131 S. Ct. at 870 (quoting 5 U.S.C. § 551).

coverage through an exchange.<sup>164</sup> In addition, in explaining its broad construction of the term “employee,”<sup>165</sup> the preamble first quotes the “plain language” of the statute.<sup>166</sup> Specifically, the preamble refers to the statute’s prohibition of retaliation against “any employee” and its authorization to “[a]n employee who believes that he or she has been discriminated against by *any employer* in violation of this section” to file a complaint.<sup>167</sup> It then contrasts that statutory language with the narrower protections contained in sections 6 and 7 of the FLSA.<sup>168</sup> Finally, as further support for its broad interpretation of the term, it cites Supreme Court precedent that establishes that “‘any’ has an expansive meaning that does not limit the word it modifies.”<sup>169</sup>

In sum, in light of the statutory text, regulatory language, and bulk of judicial authority according fidelity to the statutory text of anti-retaliation statutes, it appears unlikely that a court would find that the ACA whistleblower statute applies to an employer’s threat to terminate an employee if the employee purchases subsidized insurance through an exchange.

## V. CONCLUSION

Prior to the enactment of the Affordable Care Act, employer-sponsored health insurance was common<sup>170</sup> but entirely voluntary. The Affordable Care Act introduces, for the first time, a penalty for certain large employers that fail to offer affordable health insurance to their employees and their dependents. Originally scheduled to go into effect in 2014, implementation of the pay-or-play penalty has proven complicated and controversial.

Among the issues raised by the Affordable Care Act’s pay-or-play penalty are who are “dependents” and how “affordable” is to be determined with respect to dependent coverage. In its implementing regulations, the Treasury Department has determined that the term dependents means children, not spouses, and affordability is to be

164. Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. at 13231 (adding 29 C.F.R. § 1984.102(b)(1)).

165. See *id.* (adding 29 C.F.R. § 1984.101(3) (defining employee to include former employees and applicants for employment)).

166. *Id.* at 13225.

167. *Id.* (emphasis added).

168. *Id.*

169. Specifically, the preamble cites *Kasten*, discussed at notes 156-159, *supra*, and *U.S. v. Gonzales*, 520 U.S. 1 (1977).

170. See KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST, *supra* note 32, at 48, Exhibit 3.1 (showing that 59% of all employers offered health insurance in 2009); Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2013 Current Population Survey*, EBRI ISSUE BRIEF No. 390, Sept. 2013, at 5, Figure 1 (showing that about 60% of the nonelderly population had employment-based health insurance in 2009).

based on the cost of employee, self-only, coverage, not the cost of family coverage.

Since the enactment of the Affordable Care Act, some employers have decided to cut back on their health care coverage. Others are looking at ways to realign or restructure their workforces so as to avoid the pay-or-play penalty, or at least reduce its impact.

Because the Affordable Care Act pay-or-play penalty does not apply if an employer does not offer affordable health insurance to its employees' spouses, perhaps it is not surprising that some employers have cut back on their provision of spousal benefits. Interestingly, though, employers to date have only cut back on spousal benefits for working spouses with access to health care coverage through their own employer and not for spouses with no other access to health care coverage.

In addition to reducing spousal coverage, reports abound that employers have, or are considering, reducing the size of their workforces or hours of some of their employees in order to avoid the pay-or-play penalty. Some commentators have suggested that such workforce realignments might run afoul of Section 510 of ERISA or the ACA whistleblower provision.

Although no court has yet addressed these issues, it appears unlikely that employers that currently do not offer health insurance would violate ERISA Section 510 if they elected to reduce the size of their workforces. On the other hand, employers that currently offer health insurance might run afoul of ERISA Section 510 if they intentionally terminate their employees or reduce their hours in order to avoid the pay-or-play penalty.

It appears unlikely that an employer would violate the ACA whistleblower provision by terminating employees or reducing their hours before any employee has purchased subsidized health insurance on an exchange. If, on the other hand, an employer threatens to terminate an employee if the employee purchases health insurance on an exchange, a court might find that the employer violated the spirit of the ACA whistleblower provision. The text of the statute, however, does not support such a holding.